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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

NO. 1207

C. G. WILLIS, INC.,
Claimant of Barge BERTIE
and Tug EVELYN,

Petitioner,

v.

LATHAM B. HEWLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, C. G. Willis, Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in this matter on November 28, 1969.

OPINIONS OF THE COURTS BELOW

The opinion of the District Court for the Eastern District of Virginia is reported as *Latham B. Hewlett v. Tug EVELYN, etc., et al,* 283 F.Supp 917, (infra, pp. 1a).

The majority and dissenting opinions of the Court of Appeals for the Fourth Circuit are not yet reported but are printed hereinafter, (Majority, infra, pp. 11a; Dissenting, infra, pp. 19a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1969, (infra, pp. 27a). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254 (1).

QUESTION PRESENTED

What is the measure of marine-collision damage where an offended vessel-owner suffers no diminution in either market or special-use value, neither repairs nor intends to repair his vessel, and retains as seaworthy and practically serviceable a vessel as before the collision?

STATUTES INVOLVED

No statutes are involved herein.

STATEMENT OF THE CASE

The undisputed facts are related in the District Court's opinion, (infra, pp. 1a) and disclose as follows.

The Barge BA-1401, built in 1950, sank in Chesapeake Bay on November 11, 1958. Pursuant to a no cure—no pay salvage contract, Latham Hewlett raised the badly damaged BA-1401 in June, 1959.

As the cost of her repairs exceeded her insured value, she was declared a constructive total loss and

Hewlett accepted title to the vessel in payment of his salvage services. He expended $1,306.76 for temporary repairs, (to stop hull leaks) following which the BA-1401 had a value of $5,616.00 (which was its scrap value) although there was no market (other than scrap) for its sale. Thereafter, Hewlett used the barge on only one occasion—another salvage venture in which the 1401 was sunk, secured to a small stricken steamer, then pumped out so her buoyancy brought both vessels to the surface.

On September 28, 1960, the Tug EVELYN and Barge BERTIE, owned by C. G. Willis, Inc., brushed against the BA-1401 while moored. Damage to the 1401 consisted solely of a dent in the outer shell of her starboard side. The estimated cost of repairing that dent is $2,895.00. Hewlett admits (1) he did not repair that damage; (2) he does not intend to repair that damage; (3) the market value is not diminished by that damage; (4) the special-use value (for future salvage operations) is not diminished by that damage; (5) repair of that damage would not increase the barge's market value; and (6) repair of that damage would not increase the barge's usefulness to Hewlett.

Upon Hewlett's libel, C. G. Willis, Inc. admitted fault of the Tug EVELYN and Barge BERTIE and deposited $1.00 in the Court Registry in payment of damages. The District Court's opinion (infra, pp. 6a) concluded that neither the use-value (utility) nor market-value had been reduced and thus under the principle of *O'Brien Brothers, Inc.* v. *The HELEN B. MORAN, etc., et al,* 160 F2d 502 (2nd Cir.-1947) granted Hewlett a $1.00 award which was paid and the judgment satisfied pursuant to the District Court's Order, (infra, pp. 9a).

The Court of Appeals, in a split decision, reversed. The majority, Judges Bryan and Sobeloff, held that in the absence of any market value, the cost of repairs is equivalent to diminution in market value and this is the measure of damage.

Chief Judge Haynsworth, dissenting, said the case clearly falls within the "extent of loss sustained rule" of *Williamson* v. *Barrett,* 54 U.S. (13 How.) 101. He emphasized (1) there was a constant market value—the admitted scrap value of $5,616.00; (2) there was no diminution of that market value; (3) there was no evidence of any special-use value to the owner; (4) the owner admitted there was no diminution of special-use value; (5) there had been no actual repairs; (6) the owner admitted he never intended to make any repairs; (7) the barge was just as seaworthy and useful as it had been prior to the collision; (8) repairs would not enhance either the market or special-use values of the vessel. Thus, he said, there was no factual equivalency between "cost of repairs" and "diminution in value." Judge Haynsworth concluded no economic loss had been sustained but the majority had created an unjust or undue enrichment in permitting Hewlett to pocket his winnings with the hope that many other errant navigators might strike the BA-1401 many times, thereby permitting her owner to pocket the estimated cost of further theoretical repairs which will never be made and at the same time retain a barge as seaworthy, as useful and of undiminished worth or value.

REASON RELIED ON FOR ALLOWANCE OF WRIT

The Decision Below Is In Direct Conflict With Principles Of Marine Damage Established By The Second Circuit.

The crucial point in this case is whether there will be uniformity of precedent among the Circuits or whether the Fourth Circuit will be permitted a variation in order to grant an unjust enrichment.

The controlling principle was stated in *Williamson* v. *Barrett,* 54 U.S. (13 How.) 101, 110: "The general rule in regulating damages in case of collision is to allow the injured party *an indemnity to the extent of the loss sustained.*" (Emphasis added)

This basic principle has evolved through a long line of cases ultimately coming to a clear statement in *O'Brien Bros.* v. *The HELEN B. MORAN,* 160 F2d 502 (2nd Cir. - 1947). There Judge Augustus N. Hand drew a parallel between repair of automobiles and marine vessels stating:

> "Pound, Ch. J., in the New York Court of Appeals, discussed the principles involved where an automobile was injured in a collision and the repairs were found to cost more than the vehicle was worth. He stated a rule, which the decisions we have already quoted show to be *equally applicable to vessels injured through collision on maritime waters, as follows:*
>
> "The damages sustained by an automobile in a collision may be established by showing the reasonable cost of the repairs necessary to restore it to its former condition, although the general rule is that the measure of damages to personal property is the difference between its market

value immediately before and immediately after the injury. *This rule is subject to the limitation, first that the cost of repairs must be less than the diminution in market value due to the injury,* and, secondly, that the repairs must never exceed the value of the automobile itself as it was before the injury. *The plaintiff should not benefit by the loss.*" (Citations) (Emphasis added)

Subsequently the Second Circuit ruled in *Zeller Marine Corp.* v. *Nessa Corp.*, 166 F2d 32 (2nd Cir. - 1948) that the owner of a damaged vessel is entitled only to an award that will provide a vessel as seaworthy and practically serviceable as before. Again speaking through Judge Augustus N. Hand that Court said:

166 F2d 32 at 33:

"But where an injury can be perfectly repaired for all practical uses at slight expense, but, as in this case, cannot be placed in exactly the same condition as new, except by taking out and replacing much other good work at a very considerable expense, the court must hesitate in allowing damages on the basis of the latter mode of repair, especially where, as in this case, though a long time has elapsed, no such repair has been made. . . .

* * * * *

"In other words, *he is only entitled to an award that would give him a boat as seaworthy and practically serviceable as before and not to an award, often much larger, sufficient to restore her to the identical condition she was in before the injury.*

"The general effect of the authorities has

been a denial of damages based upon replacement of an injured portion of a vessel in cases where repairs made at substantially lower cost would render her as serviceable as before." (Citations) (Emphasis added)

Recognizing these principles established by the Second Circuit, the District Court for the District of Maryland in *The NYLAND,* 164 F.Supp 741, reviewed the judicially established principles for computation for marine collision damages in the following concise but authoritative language:

164 F.Supp 741 at 743:

"The controlling principles are set out in Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U.S. 146, 45 S.Ct. 465, 69 L.Ed. 890; O'Brien Bros. v. The HELEN B. MORAN, 2 Cir., 160 F2d 502; The I. C. WHITE, supra. Where there has been a total loss, the measure of recovery is the value of the ship at the time of loss. If the loss is not total, the measure is ordinarily the reasonable expense of repairing the ship to an extent sufficient to put her in as good condition as she was before the collision, plus a reasonable allowance for loss of use. It is not necessary that the repairs be actually made. Theothilatos v. Martin Marine Transport. Co., 4 Cir., 127 F.2d 1016. *But this rule is subject to two limitations*: First, that the repairs must not exceed the fair value of the ship as she was before the injury; and *second, that the cost of repairs must be less than the diminution in market value due to the injury, unless the ship has some special value to her owner greater than her value to others. The recovery should be limited to the actual loss suffered, and the injured*

party should not be allowed the expense of repair exceeding that limit. O'Brien Bros. v. The HELEN B. MORAN, supra."
(Emphasis added)

Until the majority opinion in the Court below the principles established in *Williamson,* in *O'Brien Bros.,* in *Zeller,* and in *The NYLAND,* have never been doubted nor even questioned.

The majority opinion, permits a recovery of damages (1) where there is no diminution in market value; (2) where there is no diminution in utility or special use value; (3) where the vessel owner makes no effort whatsoever to minimize his damags; (4) where the cost of repairs is greater than the diminution in market value; (5) where the plaintiff will benefit by the loss because he has not effected any repairs and admits he does not intend to effect any repairs due to the absence of diminution in market value and the absence of diminution in utility or use value;—(all of the foregoing being contrary to *O'Brien Bros.* and *The NYLAND*) — and, (6) where the vessel is as seaworthy and practically serviceable as before the collision; — (the requirement in *Zeller*)—and, (7) where the damages exceed the actual loss suffered — (a limitation of *Williamson, O'Brien Bros.* and *The NYLAND*).

Chief Judge Haynsworth, in his dissenting opinion stated:

"If the libellant prevails on the basis of the opinion of my brothers, his winnings will go as cash into his pocket and will not be applied to any reparation of the barge. It is thus clear beyond all dispute that repair is not economically practicable or feasible, and in no event will it be attempted.

* * * * *

"If my brothers are right, the libellant is unduly enriched. He must hope greatly that another errant navigator will hit his battered barge again, and still another yet again, so that each time he may happily pocket the estimated cost of theoretical repairs which neither he nor anyone else will ever dream of undertaking while retaining all along a barge as seaworthy and useful to him and of undiminished worth if he chooses to sell it."

CONCLUSION

Because the Fourth Circuit has now departed from the long and well established principles enunciated in the Second Circuit and heretofore followed not only in the District Court of Maryland but by the District Court herein, there is a conflict which must be resolved. Otherwise uniformity of maritime law and its application is destroyed.

Respectfully submitted,

HARRY E. McCOY
Counsel for Petitioner

Of Counsel:

Robert M. Hughes, III

APPENDIX A

MEMORANDUM OF THE DISTRICT COURT DATED MAY 8, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LATHAM B. HEWLETT,	)	
	)	
Libelant	)	Admiralty
	)	No. 8260
v.	)	
Tug EVELYN, her engines, etc.,	)	
in rem, and C. G. WILLIS CO., INC.,	)	
in personam,	)	
	)	
Respondents	)	

MEMORANDUM

This is a related case to *Petition of Southern Transportation Company,* 211 F.Supp. 940 (E.D. Va., 1963), affirmed in part and reversed in part, sub nom. *Hampton Roads Carriers, Inc.* v. *Allied Chemical Corp.,* 329 F. (2d) 387 (4 Cir., 1964). The facts pertaining to the sinking of the barge BA-1401 are sufficiently detailed in these opinions and will not be repeated. The present facts start with the BA-1401 resting on the bottom of the Chesapeake Bay.

The barge was built in Louisiana in 1950. Hampton Roads Carriers purchased the barge in 1958 for

the sum of $40,000.00. Underwriters requiring an inspection survey, dated September 11, 1958, provided full hull coverage in the amount of $45,000.00. The barge sank on November 11, 1958. On the following day divers made an underwater inspection of the barge, but their report was inconclusive other than as to the condition of the port side. Later Hewlett, the libelant, was awarded a salvage bid in the sum of $21,750.00 on a no cure-no pay basis to raise the barge.

The salvage agreement further provided that if the cost of salvage and the cost of repairs exceeded the insured value[1] of the barge, then the barge would be awarded to Hewlett in lieu of the sum of $21,750.00.

Early salvage operations were unsuccessful. In fact, it required some 15 to 20 efforts before the barge was finally raised. During the course of these attempts it is apparent that additional damage to the barge was sustained. After the barge was raised, a complete marine survey was made during late June and early July, 1959. This survey revealed several fractures of the hull, indentations on the bottom, a severe fracture in the vicinity of the No. 4 tank, and an extensive "dishing in" along the port side of the barge. Based on the survey information and personal inspection, three Norfolk area shipyards submitted bids on the cost of restoring the barge to its condition immediately prior to the sinking; the lowest bid being from Old Dominion Marine Railway Corporation in the sum of $46,290.00.[2]

Since the lowest bid exceeded the insured value of the barge, libelant took possession of and title to

---

[1]The insured value was $45,000.00.

[2]Other bids received were:
Norfolk Shipbuilding and Drydock Corporation—$62,100.00.
Colonna Shipyard, Inc.—$65,125.00.

the barge pursuant to the terms of his salvage contract. He caused temporary repairs to be performed for the purpose of stopping the leaks, upon the completion of which the barge no longer leaked.[3] These temporary repairs aggregated $1,305.76, and apparently the submitted bids did not take these temporary repairs into consideration.

Subsequently, libelant used the BA-1401 in the salvage operations of the DIXIE QUEEN. This was the only use of the barge between the time it sank in November, 1958, and the collision giving rise to the present controversy which took place on September 28, 1960. No repairs, other than the temporary repairs indicated above, had been performed in the interim period.

On September 28, 1960, the barge was moored at Old Dominion Shipyard when it was struck by the barge BERTIE, then being pushed by the tug EVELYN. The contact caused no break in the hull of the BA-1401, but did place a dent in the starboard side. Libelant concedes that this dent affected only the outer shell of the barge, and did not injure the hopper. Libelant filed this action on January 22, 1962, seeking the recovery of the cost of repairs to restore the starboard side of the barge to as good condition as existed immediately prior to contact with the BERTIE. He admits that the collision with the BERTIE did not affect either the seaworthiness of the barge or its cargo carrying capacity, but nevertheless contends that the barge was of greater value than the cost of repairs and, hence, is entitled to recover these costs. On the other hand the respondents, admitting fault as to the collision between

[3] After the completion of the temporary repairs, the barge could be used for carrying piling or logs since this product could be allowed to get wet. There is no evidence, however, that the barge was used for this purpose.

the BERTIE and BA-1401, urge that the barge was a constructive total loss and that no real or actual damages have been shown, thus restricting the recovery to nominal damages.

Where repairs are practicable and the damaged vessel is not a total loss, restitution by way of the cost of repairs is the general rule of damages. This is true even though the repairs are not made if, in fact, the value of the vessel is thereby decreased. *Streckfus Steamboat Line* v. *United States,* 27 F. (2d) 251 (5 Cir., 1928). Where, however, the vessel is a total loss, the measure of damages is the value of the vessel at the time of the collision, less any value of the wreck as salvage, *O'Brien Bros.* v. *The Helen B. Moran,* 160 F.(2d) 502 (2 Cir., 1947). We find no precedent for allowing damages where a vessel, deemed a constructive total loss, suffers still further damage. Generally speaking, in admiralty, the award of damages rests in the sound discretion of the court, and the giving or withholding of damages is predicated upon enlarged principles of equity and justice. 48 *Am. Jur., Shipping,* § 540, p. 367 (1943).

In determining whether the barge was a constructive total loss as of September 28, 1960, when the BERTIE made contact with her starboard side, we should apply the principles set forth by Judge Augustus N. Hand, with Judges Learned Hand and Chase concurring, in the *O'Brien Bros.* case, supra. The actual cost of repair may establish a prima facie case, but when the value of the barge is shown to be less than the cost of repair, the burden then rests upon the libelant to establish the value by (a) capitalization of earning capacity, (b) the cost of a barge of a similar type in the open market, or (c) the cost of constructing a new barge if that is feasible. In each instance

there must be a deduction of proper depreciation due to the age and deterioration of the vessel. The least of these alternatives would furnish the measure of recovery because of the duty of the injured party to minimize damages. Applying any possible alternative, it is abundantly clear that the BA-1401 was a constructive total loss on September 28, 1960, prior to the BERTIE striking it.

In general, "the worth of the thing is the price it will bring"—the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Standard Oil Co.* v. *So. Pacific Co.,* 268 U.S. 146, 155 (1925); *The Nyland,* 164 F. Supp. 714, 743 (D. Md., 1958); *The I. C. White,* 295 Fed. 593, 595 (4 Cir., 1924). Manifestly, the BA-1401 would have brought nothing but scrap value prior to the collision of September 28, 1960. The libelant still retains that value and it has not been diminished by the impact in question. Whether we accept a valuation of $40,000.00 (purchase price in 1958) or the full insurance value of $45,000.00 as of the time of acquisition by Hampton Roads Carriers, and whether we charge any depreciation for its use prior to its sinking on November 11, 1958, the lowest bid for repairing the barge exceeded either valuation. Nor do we believe that the making of temporary repairs aggregating $1,305.76 in any way removes the BA-1401 from the category of a constructive total loss.

Finding that the BA-1401 was a constructive total loss prior to the additional damage sustained on September 28, 1960, we feel that the controlling principle is as stated by Chief Justice Pound in the New York Court of Appeals (cited with approval in *O'Brien Bros.* v. *The Helen B. Moran* supra), where it is said:

". . (T)he cost of repairs must be less than the diminuation in market value due to the injury, and, secondly, that the repairs must never exceed the value of the automobile itself as it was before the injury. *The plaintiff should not benefit by the loss.*" (emphasis supplied).

In his brief, the libelant admits that probably no willing buyer could be found for the barge. Its salvage value remains unchanged; its cargo carrying capacity is the same; it will still float. To make an award of damages would unjustly enrich the libelant. The situation is akin to that arising in the *Petition of Socony Vacuum Transp. Co.*, 93 F. Supp. 718 (S.D. N.Y., 1950), where THE EMPIRE GARRICK struck the CHOAPA which had previously been dealt a fatal blow by THE VOCO, and the court dismissed the libel filed by THE CHOAPA against THE EMPIRE GARRICK. It is simply a case of nominal damages for violation of a duty with no compensable damages resulting therefrom.

Certainly the repairs to the starboard side of the barge were not practicable in this case. Whether the repairs are practicable depends on whether the libelant would have any reasonable justification for going ahead with the repairs. *Detroit & Cleveland Nav. Co.* v. *The Elbert H. Gary*, 161 F.Supp. 570 (E.D. Mich., 1958). Manifestly, the repairs in the instant case were not practicable.[4] The barge's market value and utility value have not been diminished. Indeed, the overwhelming weight of the evidence is to the effect that it would be foolish to make the repairs to the starboard side

[4]Note the words of Judge Addison Brown, a recognized authority in the field of admiralty, in *The J. T. Easton*, 24 Fed. 95 (S.D.N.Y., 1885), in dealing with the ascertainment of damages where repairs are not made for long periods of time.

without also doing the repairs caused by the 1958 sinking. It is not substantially contradicted that, before using the barge for grain-carrying purposes, the major repairs would have to be effected.

Because the respondents initially denied any breach of duty and improper navigation, the libelant is entitled to the sum of $1.00 by way of nominal damages together with his costs in this court. The sum of $1.00 was heretofore tendered on October 11, 1962.

Practor for respondents will prepare an appropriate decree.

/s/WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
May 8, 1968

APPENDIX B

JUDGMENT ORDER FILED MAY 16, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LATHAM B. HEWLETT,	:	
Libelant,	:	
vs.	:	Admiralty No. 8260
Tug EVELYN, her engines, etc., *in rem,* and C. G. WILLIS CO., INC., *in personam,*	:	
Respondent.	:	

FINAL DECREE

The Respondent, C. G. Willis Co., Inc., having heretofore admitted liability in this cause and having tendered the sum of One Dollar ($1.00) into the Registry of the Court on October 11, 1962, and this cause having duly come on to be heard in its regular order on the tenth day of June, 1963, upon pleadings and proofs of libelant's damages, and having been argued and submitted by the advocates of the respective parties, and the Court, after due deliberation, having rendered its opinion in writing dated May 8, 1968, awarding libelant damages in the sum of One Dollar ($1.00), with costs,

It is hereby ORDERED that the opinion of the Court heretofore filed herein on the eighth day of May, 1968, be and hereby is adopted as the Court's findings of fact and conclusions of law, and

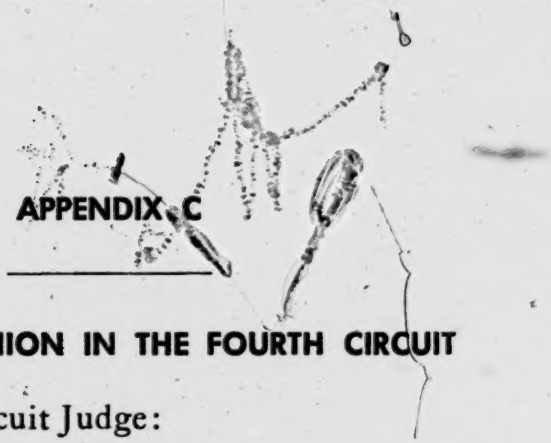
It is further ORDERED, ADJUDGED and DECREED that the libelant herein recover of the respondents, C. G. Willis & Co., Inc., the sum of One Dollar ($1.00) plus taxable costs, and

It is further ORDERED that the Clerk is hereby directed to pay the sum of One Dollar ($1.00) from the Registry of the Court to proctors of libelant and thereupon mark the judgment herein paid and satisfied in full, and

It is further ORDERED that all bonds and stipulations posted by the parties be and hereby are dismissed.

/s/WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
May 16, 1968



APPENDIX C

MAJORITY OPINION IN THE FOURTH CIRCUIT

Albert V. Bryan, Circuit Judge:

Computation of pecuniary damages recoverable for a ship's injury in a maritime collision centers this cause. The minim of the injury here, however, obscures and tempts neglect of the importance of the issue.

Without dispute, the facts are that barge BA-1401, afloat and made fast alongside a pier in the Elizabeth River at South Norfolk, Virginia, on September 28, 1960 was struck by another barge then in tow of tug Evelyn. The offending towboat and tow were libeled by Latham B. Hewlett, owner of the BA-1401, for reimbursement of the injuries alleged to have been sustained by his barge. As claimant of the attached or arrested accused vessels, C. G. Willis Co., Inc. answered.

Waiving the traverse in the answer, the respondents confessed negligence at trial and relied exclusively on absence of injury. The admiralty court only allowed the libelant "the sum of $1.00 by way of nominal damages" with costs. He appeals.

The basis of the decision was that as the BA-1401 had been declared a constructive loss two years before, the District Court was of the opinion that a subsequent injury could not sustain a claim. This declaration followed upon her misfortune on November 11, 1958, when she foundered in Chesapeake Bay near the mouth of the Potomac River. See Hampton Roads Carriers, Inc. v. Allied Chemical Corp., 329 F2d 387 (4 Cir. 1964). Raised and refloated by the present libelant as

contractor-salvor in June 1959, the repair and recovery cost of the barge was estimated to exceed both her 1958 purchase price of $40,000.00 and current insurance of $45,000.00. In these circumstances she was released to Hewlett in satisfaction of his claim for services. After $1305.76 was expended upon her in temporary repairs, such as leak stoppages, she was brought to Norfolk.

The barge was used or useable for carrying pilings or logs—weather-proof cargo. She was engaged on one occasion as a pontoon or caisson in lifting a steamer from the river bottom. In this task the barge was allowed to fill, settle beside the sunken ship and then attached to her. When pumped out, the barge's buoyancy brought the steamer to the surface.

Admittedly, the barge had no market value as an instrument of navigation and could be sold only for scrap. The skin of the barge was not pierced in the collision, and the only mark of impact was a dent in her starboard side. It produced no harmful effect upon the barge's seaworthiness or carrying capacity.

Our concern is the acceptance by the instance court of the respondent's defense to the damage claim, i.e. "the barge was a constructive total loss and that no real or actual damages have been shown, thus restricting the recovery to nominal damages". The decree on review purports to fix "nominal damages", but this is in reality a dismissal of the libel, for admiralty does not recognize nominal damages. Herbst v. The Asiatic Prince, 97 Fed. 343, 345 (SDNY 1899, opinion by Judge Addison Brown). Presently, the Court stated, "We find no precedent for allowing damages where a vessel, deemed a constructive total loss, suffers still further damage." Apparently, the award of $1.00 was the product of this proposition. It is, we think, an untenable

postulate; if accepted, it could result in unjust deprivations.

Actually, the case does not commence with the barge as a constructive loss, as the admiralty judge believed. True, that was her status more than a year previous, but only as between the owner and the salvor. Even this, however, was not a decree of outlawry. She was not a derelict, to be jostled about with impunity. Indeed, as a sheer-hulk she had a demonstrated utility for the libelant. Slightly more than a year previous, to repeat, $1305.76 had been expended in restoration. The accused tugboat and tow cannot escape liability by recall of the past ill luck of the BA-1401. Nor are they relieved by showing that she has not suffered in utility value or in market value.

To illustrate, although an automobile through age or misfortune may have no value in the market save for scrap, and although still another nick in its paint or shape may not appreciably reduce the usefulness or dollar-value of the car, nevertheless its checkered career and disreputable appearance do not assure absolution to one who negligently further scars the vehicle. The owner is entitled to have the automobile free of even that dent. De minimis non curate lex does not, semble, apply to damages but only to injury. Fullam v. Stearns, 30 Vt. 443, 455 (1857).

"Restitutio in integrum" is the precept in fixing damages, and "where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to

the condition in which she was at the time the collision occurred. . . ." The Baltimore, 75 US 377, 385 (1869)[1].

The workable guides to this end, generally stated, are these. If the ship sinks and is beyond recovery, the damages are her value just before she sank, plus interest thereon until payment. If she is not a complete loss and repossession or repairs are both physically and economically feasible, then the reasonable cost of recovery, including repairs and an allowance for deprivation of use, is the measure. But if the reclamation expense including repairs exceeds the ship's just value at the time of the casualty, or if repairs are not both physically and economically practicable, then it is a constructive total loss, and the limit of compensation is the value plus interest. O'Brien Bros. v. The Helen B. Moran, 160 F2d 502 (2 Cir. 1947).

The case at bar comes closer to the second category—the loss was not complete, repairs were physically practicable, but the question remains whether they were economically so. The answer depends on whether the repair cost was more than the value of the barge. Libellant has shown a fair estimate for the repairs to be between $2895.00 and $3000.00. If this expense was beyond the fair and reasonable monetary value of the vessel to the owner, then the recovery is limited to such value. Cf. The Nyland, 164 FS 741, 743-44 (D.C.Md. 1958).

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[1]Nothing said in Zeller Marine Corp. v. Nessa Corp., 166 F2d 32 (2 Cir. 1948) would circumscribe this holding. There the Court concluded that repairs would serve in lieu of replacement of damaged keelsons, and so disallowed the claim for new ones. It was in this context that Judge Augustus Hand stated that a libellant was "only entitled to an award that would give him a boat as seaworthy and practically serviceable as before and not to an award, often much larger, sufficient to restore her to the identical condition she was in before injury".

When, as here, the tortfeasors assert that the value is less than the cost of repairs, they have the burden to establish that fact. The respondents have failed to do so. Consequently, the case stands on the proof of the repair cost, and the libellant is entitled to a decree in that amount.

The District Court made no finding of value. It merely found that the BA-1401 had no value save for sale as scrap, but this is not the equivalent of fixing a figure of value. Moreover, it is erroneous. It is refuted by the other uncontested findings of her continuing utility.

Apparently, the chief factor influencing the District Judge in this determination was the absence of any market for the sale of the barge. That problem, however, cannot justify withholding all value from libellant's vessel. Zvolanek v. Bodger Seeds, Ltd., 5 Cal. App. 2d 106, 42 P2d 92 (1935). The special value to the owner is a consideration of substance. The Nyland, supra, 164 FS 741.

"It may be that property destroyed or lost has no market value. . . . it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely." Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752, 755-56 (1906). If there is no market value, other indicia of value must be looked to. Standard Oil Co. v. So. Pacific Co., 268 US 146, 155 (1925); The President Madison, 91 F2d 835, 845 (9 Cir. 1937); The I. C. White, 295 Fed. 593, 595 (4 Cir. 1924). Among other factors is the use value to the owner. As was said in Bishop v. East Ohio Gas Co., 143 Ohio St. 541, 56 NE2d 164, 166 (1944):

> "Market value is the standard which the courts insist on as a measure of direct property

loss, where it is available, but that is a standard not a shackle. When market value cannot be feasibly obtained, a more elastic standard is resorted to, sometimes called the standard of value to the owner. This doctrine is a recognition that property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring in the open market."

See, too, 12 ALR2d 911, 913.

Even if the cost of repairs be limited to the *diminution* in value of the ship rather than to her entire value, our decision would, for at least two reasons, not be different. The first point of our conclusion here is that no such values were proved. Beyond that, however, the second point is that in admiralty, the cost of repairs is the equivalent of value-diminution. "Damage less than total loss is compensated by reference to cost of repairs. . . ." Gilmore & Black, *Admiralty,* 436; Pan-American Petroleum & Transport Co. v. United States 27 F2d 684, 685 (2 Cir. 1928):

> ". . . Strictly the measure of damages in collision is the difference in value between the ship before and after the collision, but the cost of the necessary repairs and the loss of earnings while they are being made have long been regarded as its equivalent. . . ."

Furthermore, the cost of repairs is considered an accurate measure. Diminution in value is always dependent upon an opinion, while repairs are not quite so speculative. This distinction was noted in The Schooner Catharine v. Dickinson, 58 US 170 (1854). Then, too, the preference is based on practicalities, as well illustrated here.

The order on appeal will be vacated, and the cause remanded with request to the District Court to enter a decree awarding the appellant Hewlett damages of $2895.00, with interest at 6% per annum from the date of the collision until paid, together with costs in the trial and appellate courts.

Reversed and remanded for entry of judgment

APPENDIX D

MINORITY OPINION IN THE FOURTH CIRCUIT

HAYNSWORTH, Chief Judge, dissenting:

With respect to my brothers, I must dissent, for I think they misapprehend the record, the issue presented, and the legal principle which should control its resolution.

Clarity may be served if I first lay aside one area in which there is no disagreement between us. The fact that the barge had earlier been declared a total constructive loss gave no subsequent wrongdoer an immunity. The District Judge did not hold otherwise. I readily agree, too, that the fact that she was previously declared a constructive total loss has no legal significance in itself in the assessment of the damages or in the application of the governing legal principles. It has only historical significance as the basis upon which the salvor, the principal libelant, acquired her. The prior physical history of the barge, however, is highly relevant in explanation of her condition, her value and potential uses, with respect to all of which the record is far clearer with much less disagreement than the majority opinion might indicate.

The Barge 1401 had been purchased in 1958 for $40,000 and immediately insured for $45,000. One month later she sank. After salvage operations, the lowest bid for restoration to her former condition was $46,290. That was why she was declared a constructive total loss and surrendered to the salvor.

The salvor effected certain repairs costing only

$1305.76, which had the effect of making her hull watertight. She was then usable as a pontoon in other salvage operations, as she was once used. It gave her a theoretical potentiality for hauling deck cargo, though she had never been used for such a purpose, and it is very doubtful that she could have been insured for such use.

The barge in her then condition had a market value of $5,616. This was her scrap value, but it was a ready market value, and it seems to me to be a mistake to approach the case as if there were no market value when everyone agrees there was.

Everyone agrees, too, that the market value of $5,616 was not affected in the slightest by the additional dent inflicted in her side when the Barge Bertie collided with her. The already battered Barge 1401 had a scrap value after the additional dent of $5,616, just as she had before.

The libelant here, of course, claimed that the Barge 1401 had a special value to him for use as a pontoon, as once he used it, and potentially, but highly theoretically, for use in carrying telephone poles or other dry deck cargo, a use in which she had never been engaged. It is true, of course, that the special value, if any, was not determined in the District Court, but everyone agrees that the additional dent placed in her side by the Barge Bertie did not effect any diminution in that value, whatever it was. She was as useful as a pontoon after she sustained this dent as she was before, and whatever potential she had for use in carrying deck cargo was not impaired in the slightest.

Under these circumstances, of course, the owner did not attempt to effect the repair of the barge for the repairs were estimated to cost $2,895, and that expendi-

ture would not enhance the value of the barge or its usefulness to the libelant, or to anyone else, in the slightest. No one claims that any such repairs would ever be attempted. If the libelant prevails on the basis of the opinion of my brothers, his winnings will go as cash into his pocket and will not be applied to any reparation of the barge. It is thus clear beyond all dispute that repair is not economically practicable or feasible, and in no event will it be attempted.

It is thus settled in the record that the additional dent inflicted by the Barge Bertie occasioned no diminution in the market value of the Barge 1401 of $5,616; it occasioned no diminution in any special value she may have had to the libelant. Between the parties, there is no dispute about this. The conclusion is inescapable that the libelant has suffered no economic loss. The question then is whether the libelant's damages should be measured by his economic loss, as was done in the District Court, or by an estimate of the cost of economically imprudent and senseless repair which has not been and never will be incurred.

I think the damages are to be measured by the economic loss sustained by the libelant and that no different rule can be found in admiralty by looking at isolated statements lifted from their context.

In *Williamson* v. *Barrett*, 54 U.S. (13 How.) 101, 110, the Court stated what until today never seems to have been doubted: "The general rule in regulating damages in cases of collision is to allow the injured party an indemnity to the extent of the loss sustained." The loss sustained, of course, is the difference in the value of the vessel before and after the collision, together with a sum to compensate for the loss of her service during the completion of repairs, if she is repa-

rable. The particular question in *Williamson* related to the latter assessment. When repairs are economically feasible, however, the assessment of the first item of damage may not depend upon generalized appraisals of the value of the vessel before and after the collision, for the difference in fact is measured by the cost of repair. This was clearly stated in *The Schooner Catharine* v. *Dickinson,* 58 U.S. (17 How.) 170. The Catharine sank as a result of a collision just off the New Jersey coast and her owners sold her where she lay for $140. They claimed the difference between the appraised value of the vessel before the collision and $140. The fact, however, was that the schooner had been raised, repaired and returned to service. The Supreme Court held that the actual cost of raising the vessel, repairing her and returning her to service was a more accurate measure of the diminution in value than could be gotten by use of the owner's sales price before she was raised or by the general opinions of inexpert witnesses that the vessel was worth no more than the owner's appraisal before she was refloated.

Since the Supreme Court's decision in *The Catharine* one frequently encounters the expression that the cost of repairs is the equivalent of the diminution in value. This is factually true whenever repairs are economically feasible, for whatever the appraisal of the vessel's value before the collision, all practical men know that the diminution in value is measured by the reasonable cost of necessary repairs to substantially return the vessel to its former condition. That is a more accurate measure of the diminution than a comparison of appraisals by some of the precollision value with general appraisals by others of the postcollision value, as was held in *The Catharine.*

Where factual equivalency exists between diminution in value and cost of repair, there are still some limitations, for when the cost of restoring the vessel to her former condition is disproportionate to the cost of more limited repair which would substantially restore the vessel's utility, recovery must be measured by the cost of the lesser repairs.[1] As Judge Augustus Hand has stated in *Zeller Marine Corporation* v. *Nessa Corporation,* 2 Cir., 166 F.2d 32, 34, the owner "is only entitled to an award that would give him a boat as seaworthy and practically serviceable as before, and not to an award, often much larger, sufficient to restore her to the identical condition she was in before the injury."[2] Where factual equivalency exists, therefore, between diminution in value and cost of repair, it is equivalent to the cost of such limited repairs as are necessary to make the vessel as seaworthy and practically useful as before, which, in this case, is nothing at all.

There is no factual equivalency between diminution in value and the cost of repair when the cost of repair is greater than the precollision value of the vessel. In such a case, the measure of damages is clearly the precollision value of the vessel.[3] That this truism is sometimes expressed as a limitation upon the right to recover cost of repairs does not obscure the absence of factual equivalency between diminution in value and cost of repair and the irrelevance of the cost of repair in such a situation. Cost of repair is not the measure of damages

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[1]The J. T. Easton, S.D.N.Y., 24 F. 95, 96; Zeller Marine Corp. v. Nessa Corp., 2 Cir., 166 F.2d 32, 33-34.

[2]The attempted distinction of *Zeller* by my brothers is actually a rejection of it; if *Zeller* and the majority opinion stand, the libelant in this case would receive only $50 had an expenditure of that amount been necessary to restore its seaworthiness even though total repairs would cost much more. But my brothers give him the total cost of repairs when seaworthiness is not impaired by the collision.

[3]See, e.g., The Nyland, D.C. Md., 164 F. Supp. 741, 743-44.

simply because in that situation it is not the factual equivalent of diminution in value.

In this case there is no factual equivalency between diminution in value and cost of repair. The parties and the court are agreed that there was no diminution in the market value of the barge, or in any special value it may have had to the libelant.[4] The barge is now as seaworthy and as practically useful to the libelant as it was before the collision; it is worth just as much on the market. The majority, therefore, inevitably are suggesting that despite the conceded absence of factual equivalency between diminution in value and cost of repair, there is a legal equivalence which requires a disregard of its factual inconsistency. This, I submit is clearly refuted by the cases and the situations mentioned above when the cost of repair is not allowed as a measure of recovery in the absence of factual equivalency between such costs and diminution in value. It is a novel suggestion for which I can find no support in any case, and which seems to me at war with reason. With the assessment of damages, we move in a very practical field where regard must be had for factual differences and obfuscating legal presumptions which would substitute rules of law for factual assessments have no place.

If my brothers are right, the libelant is unduly enriched. He must hope greatly that another errant navigator will hit his battered barge again, and still another yet again, so that each time he may happily pocket the estimated cost of theoretical repairs which neither he nor anyone else will ever dream of undertaking while

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[4]The majority opinion suggests that the special values before and after the accident were not proved. The libelant, of course, would bear the burden of such proof, but the lack of such proof is irrelevant since the stipulated facts prove that there was no difference in the values.

retaining all along a barge as seaworthy and useful to him and of undiminished worth if he chooses to sell it.

The question is not whether the battered barge is an outlaw. It is not. The District Court held the tug and the Barge Bertie responsible for the economic loss of the libelant, and, of course, awarded to the libelant the costs of the action. I think the District Court properly determined the amount of the libelant's loss and that my brothers stray far afield when they undertake to reappraise it by their creation of a legal presumption which is demonstrably inconsistent with the conceded factual situation.

I would affirm the judgment.

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 12,671.

LATHAM B. HEWLETT, *Appellant,*

vs.

Barge BERTIE, in rem, Tug EVELYN, her engines, etc., in rem, and C. G. Willis Co., Inc., in personam, *Appellee.*

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; and the cause is remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, with request that the District Court enter a decree awarding the appellant Hewlett damages of $2,895.00, with interest at 6% per annum from the date of the collision until paid, together with costs in the trial and appellate courts.

/s/SAMUEL W. PHILLIPS
Clerk

FILED
NOV. 28, 1969
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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 1207

C. G. WILLIS, INC.,
Claimant of Barge BERTIE
and Tug EVELYN,

Petitioner,

v.

LATHAM B. HEWLETT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Latham B. Hewlett, respectfully prays that a Writ of Certiorari be denied to the Petitioner, C. G. Willis, Inc., and states that the Final Judgment entered by the United States Court of Appeals for the Fourth Circuit, entered in this matter on November 28, 1969, is plainly right.

QUESTION PRESENTED

What is the proper measure of damage to the Barge

BA-1401, the lowest estimate for repairs being $2,895.00?

STATEMENT OF THE CASE

The Barge BA-1401 was moored to a pier on September 28, 1960, when the Tug Evelyn and Barge Bertie damaged the Barge BA-1401. The Petitioner, C. G. Willis, Inc., admits liability and thus the question of liability and causation were admitted by the Petitioner. The only issue is the amount of damages. The Petitioner admits to having damaged Barge BA-1401, to the extent of $1.00. The lowest estimate for the repair of Barge BA-1401 as testified to, was $2,895.00. The Admiralty Court awarded $1.00 by way of nominal damages. To that Judgment the Respondent here appealed and the United States Court for the Fourth Circuit reversed and entered Judgment for $2,895.00.

In reversing the trial court, Circuit Court Judge Bryan stated as follows:

> "Our concern is the acceptance by the instance court of the respondent's defense to the damage claim, i.e. 'the barge was a constructive total loss and that no real or actual damages have been shown, thus restricting the recovery to nominal damages'. The decree on review purports to fix 'nominal damages', but this is in reality a dismissal of the libel, for admiralty does not recognize nominal damages. *Herbst* v. *The Asiatic Prince*, 97 Fed. 343, 345 (SDBY 1899, opinion by Judge Addison Brown). Presently, the Court stated, 'We find no precedent for allowing damages where a vessel, deemed a constructive total loss, suffers still further damage.' Apparently, the award of $1.00 was the product of this proposition. It is, we think, an untenable postu-

late; if accepted, it could result in unjust deprivations."

* * * * * *

"'Restitutio in integrum' is the precept in fixing damages, and 'where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred. . .' The Baltimore, 75 U.S. 377, 385 (1869)."

* * * * * *

"When, as here, the tortfeasors assert that the value is less than the cost of repairs, they have the burden to establish that fact. The respondents have failed to do so. Consequently, the case stands on the proof of the repair costs, and the libellant is entitled to a decree in that amount.

"The District Court made no finding of value. It merely found that the BA-1401 had no value save for sale as scrap, but this is not the equivalent of fixing a figure of value. Moreover, it is erroneous. It is refuted by the other uncontested findings of her continuing utility."

* * * * * *

"'It may be that property destroyed or lost has no market value . . . it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely.' Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752, 755-56 (1906). If there is no market value, other indicia of value must be looked to. Standard Oil Co. v. So. Pacific Co., 268 U.S.

146, 155 (1925); The President Madison, 91 F. 2d 835, 845 (9 Cir. 1937); The I. C. White, 295 Fed. 593, 595 (4 Cir. 1924). Among other factors is the use value to the owner. As was said in Bishop v. East Ohio Gas Co., 143 Ohio St. 541, 56 N.E. 2d 164, 166 (1944):

'Market value is the standard which the courts insist on as a measure of direct property loss, where it is available, but that is a standard not a shackle. When market value cannot be feasibly obtained, a more elastic standard is resorted to, sometimes called the standard of value to the owner. This doctrine is a recognition that property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring in the open market.'

'See, too, ALR2d 911, 913.'

"Even if the cost of repairs be limited to the *diminution* in value of the ship rather than to her entire value, our decision would, for at least two reasons, not be different. The first point of our conclusion here is that no such values were proved. Beyond that, however, the second point is that in admiralty, the cost of repairs is the equivalent of value-mininution. 'Damage less than total loss is compensated by reference to cost of repairs. . . .' Gilmore & Black, Admiralty, 436; Pan-American Petroleum & Transport Co. v. United States 27 F 2d 684, 685 (2 Cir. 1928)."

The Respondent states that Barge BA-1401 had no fair market value but it had a utility value in accordance with the evidence. The Barge was used and

was insurable. Restitution and compensation is the rule in all cases where repairs are practicable. That of course is what Latham B. Hewlett, Respondent, desires in this case, that the Barge be put in the exact condition that it was prior to the collision. *Rodi* v. *Dean,* 138 F. 2d 309 (1944); *O'Brien Bros.* v. *The Helen B. Moran,* 160 F. 2d 502 (1947).

As stated by Judge Bryan in his majority opinion:

> "To illustrate, although an automobile through age or misfortune may have no value in the market save for scrap, and although still another nick in its paint or shape may not appreciably reduce the usefulness or dollar-value of the car, nevertheless its checkered career and disreputable appearance do not assure absolution to one who negligently further scars the vehicle. The owner is entitled to have the automobile free of even that dent. De minimis non curate lex does not, semble, apply to damages but only to injury. Fullam v. Stearns, 30 Vt. 443, 455 (1857)."

Is there a conflict between the United States Court for the Fourth Circuit and the United States Court for the Second Circuit?

Many cases cited by Judge Bryan with approval were cases decided by the United States Court for the Second Circuit.

Another case deciding the issues herein is *The Nyland,* 164 Fed. Supp. 741 (1958). It was held that where a vessel is a total loss the measure of damages is the value of the ship at the time of loss. If the loss is not total, the measure is ordinarily the reasonable expense of repairing the ship, to extent sufficient to put her in as good condition as she was before the collision, plus

a reasonable allowance for the loss of use. It is not necessary that the repairs be actually made, but the repairs must not exceed the value of the ship as she was before the injury, and must be less than the diminution in market value due to the injury, unless the ship has some special value to her owner greater than her value to others.

In *Rodi* v. *Dean*, 138 F. 2d 309, (1944), it was held that where it appeared that the vessel which sank in the collision was a pleasure boat and there was little, if any, market for boats of such class, and it also appeared that there was not a total loss, damages were properly measured by estimated cost of repair rather than market value. This is an interesting case because it is somewhat similar to the situation we have with Barge 1401. The pleasure boat had a value, but probably had no fair market value as there could not be found a willing buyer and a willing seller, which, of course, determines the fair market value.

Respondent submits that there does not appear to be a conflict between the Circuits.

CONCLUSION

Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HOWARD I. LEGUM
Counsel for Respondent

Of Counsel:
MORRIS H. FINE